U.S. Department of Justice

Civil Division

Washington, D.C. 20530

July 29, 1997

TO: George J. Phillips
Counselor to the Assistant
Attorney General

FROM: Jeffrey Axelrad
Director, Torts Branch
Civil Division

RE: Class Actions And The Global Tobacco Settlement

This memorandum supercedes our memo on the same subject of July 28, 1997. We have added additional comments to the discussion of the Castano-type class actions and provided an updated chart summarizing these cases.

An Analogous Situation to the Tobacco Litigation: The Asbestos Class Action

- The Supreme Court has recently considered the propriety of a class action for a mass tort situation. Interpreting Federal Rule of Civil Procedure 23, the Amchem decision provides binding law on the federal courts and non-binding guidance to the state courts. Any evaluation of the class action provisions in the global tobacco settlement should consider the impact of this case.

  - The mass tort experience with asbestos products is analogous to the current tobacco litigation. The dangers of asbestos products were allegedly known to its manufacturers in the 1930s. Nonetheless, millions of individuals were exposed to asbestos-containing products during the subsequent decades. Numerous asbestos-related injuries began surfacing during the 1960s, and a floodgate of lawsuits emerged in the 1970s.

  - Similarly, anti-tobacco proponents argue that the tobacco industry knew of the ill-health effects of their products several decades ago. Despite this knowledge, the industry allegedly embarked on a campaign of misleading advertising practices and denials.

There are millions of current and past smokers who are, or may become, ill from usage of tobacco products.[1]

- In Amchem Products, Inc. v. Windsor, et al., ____ S. Ct. ____, 1997 WL 345149 (6/25/97), the Supreme Court affirmed the Third Circuit's decertification of a class that sought to settle current and future asbestos-related claims. The proposed class encompassed hundreds of thousands, perhaps millions, of individuals who were, or could be, adversely affected by past exposure to asbestos products. There were no further subclasses.

- The settlement attempted to resolve all pending claims against the settling manufacturers, as well as precluding future lawsuits. The settlement proposed an administrative mechanism to compensate the class members.

  - The asbestos settlement outlined a schedule of payments to compensate the class members who met the defined asbestos-exposure and medical requirements. It set caps to the potential recoveries of the class members.

- Under the Federal Rules of Civil Procedure, a group of individuals will be certified as a class only if *inter alia* there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). In Amchem the Court held that the class members' shared experience of exposure to asbestos and their desire in receiving a fair, speedy, and just compensation for their claims did not satisfy the commonality requirement of Rule 23.

  - Citing with approval the Third Circuit's analysis, the Court noted that the class members were exposed to different asbestos-containing products at different times, in different periods, and in different ways. Each member had a different medical history and contracted different diseases. Amchem, 1997 WL 345149 at * 19.

- The asbestos class was also defective because the named parties did not adequately protect the interests of the class. Parties with diverse medical conditions acted on behalf of a single giant class, rather than on behalf of discrete subclasses.

- Any potential class action by smokers in federal court would have to avoid the objections raised by the Supreme Court in Amchem to the asbestos class. Smokers, like asbestos victims, have multifarious exposure histories and injuries. Any large-scale class of smokers would probably be subject to an attack similar to the one which defeated the asbestos class in

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[1] Warning labels on cigarette packages appeared in the 1960s. Thus, the tobacco industry has always contended that insofar as smoking may be a health risk factor for any disease, individual smokers have assumed that risk. The same cannot be said for the millions of persons exposed to asbestos.

Amchem.

Summary of the Castano Class Actions

- In May 1996, the Fifth Circuit reversed a district court's certification of a nationwide class for all nicotine-dependent persons. Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996). In the wake of this decision, the Castano plaintiffs' attorneys have filed similar actions on a state-by-state basis.
  - The most recent class action filed by the Castano attorneys is Clay v. American Tobacco Co., Inc., No. 97-4167-JPG (S.D. Ill., filed May 22, 1997). Attempting to create a class for those persons not involved in the other class actions, this lawsuit was apparently filed in part to avoid a statute of limitations problem (one year has passed since the Fifth Circuit's decision).
- The accompanying chart summarizes the Castano-type class actions that have been attempted since the Fifth Circuit's decision. Attempts to certify classes have been made in both federal and state court.
  - The plaintiffs' steering committee for Castano has apparently been responsible for the filing of 18 class actions after the decertification of the national class. The chart lists those cases and other class actions brought against the tobacco industry which raise similar claims.
  - Three federal courts have denied certification. In at least five other federal lawsuits, certification is currently pending. In contrast, state courts have *granted* classes in two cases, while several other certifications are pending.
  - There have been no decisions regarding certification of these classes since the Amchem decision.
- Subsequent to the Castano decision, two federal courts have concluded that similar class actions against the tobacco industry would not be certified.
  - In Arch v. American Tobacco Co., 1997 WL 312112 (E.D. Pa. 1997), a district court denied a plaintiffs' motion for certification of a class comprising all residents of Pennsylvania who are cigarette smokers as of December 1, 1996, and began smoking before the age of 19 while residents of Pennsylvania. The size of this group was estimated at 1 million persons.
  - The district court in Arch concluded *inter alia* that the individual issues of the putative class vastly outnumbered the common issues. Even though the class was alleging an addiction injury, which could be construed as precluding an assumption of

the risk defense by the industry, the court still determined that "the assessment of addiction is an inherently individual inquiry." Arch, 1997 WL 312112 at * 16.

- The court further stated that to succeed on their products liability and negligence claims, the plaintiffs would need to show causation, "which the Court finds is not capable of determination on a class-wide basis in this case." Arch, 1997 WL 312112 at 16. An item of damage sought, the creation of a medical monitoring program, would also require an individualistic determination, varying with a person's amount and duration of smoking.

- In Smith v. Brown & Williamson Tobacco Corp., 1997 WL 381264, No. 96-0459-CV-W-3 (W.D. Mo., 5/22/97), another attempt at a class action was defeated by the industry. In Smith, the proposed class consisted of all persons in the state of Missouri who suffered personal injury as a result of smoking cigarettes made by the Brown & Williamson Corporation.

  - Based on the responses from notices in various state-wide newspapers, the plaintiffs estimated that the size of the class might be in excess of 2000 persons. Despite this relatively low number of smokers comprising the class, the district court still denied certification.

  - The district court held *inter alia* that simply limiting the class to Missouri residents did not resolve the potential problem of multiple state laws being applicable.

  - The court also concluded that the common issues were "common" only in the general sense and did not warrant a class certification. For example, the court found that: "Liability will not turn on whether cigarettes are generally capable of causing disease: liability will depend upon whether cigarettes caused a particular plaintiff's disease." Smith, 1997 WL 381264 at * 5.

- Based on these federal decisions, it can hardly be said that the plaintiffs' bar has turned the corner as far as succeeding with class actions in federal court. They have had some success in state court (e.g. Engle v. R.J. Reynolds Tobacco Co., 672 So.2d 39 (Fla. App. 1996)) and would probably pursue, to the extent possible, any future class actions in state venues.

CASTANO-TYPE CLASS ACTIONS IN FEDERAL COURT

NUMBER	NAME	CERTIFICATION STATUS
1.	Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996)	Denied
2.	Hansen v. American Tobacco Co., Inc., No. LR-C-96-881, (E.D. Ark.)	Pending
3.	Arch v. American Tobacco Co., 1997 WL 312112 (E.D. Pa. June 3, 1997)	Denied
4.	Smith v. Brown & Williamson Tobacco Corp., 1997 WL 381264 (W.D. Mo. May 22, 1997)	Denied. Motion to reconsider pending.
5.	Barreras Ruiz v. American Tobacco Co., No. 96-2300 (D.P.R.) (filed Oct. 23, 1996)	Pending
6.	Emig v. American Tobacco Co., No. 97-1121-MLB (D. Kan.) (complaint filed Feb. 2, 1997)	Pending (removed from state court)
7.	Clay v. American Tobacco Co., Inc., No. 97-4167-JPG (S.D. Ill.) (complaint filed May 22, 1997)	Pending
8.	Walker v. Liggett Group Inc., No. 2:97-0102, (S.D. W.Va.) (complaint filed Feb. 3, 1997)	Pending
9.	Richardson v. Philip Morris Inc., No CCB-96-1963 (D. Md.) (complaint filed May 24, 1996)	Unknown (note: removed to federal court, and subsequently remanded back to state court)

10.	McCune v. The American Tobacco Co., No. 97-C-204 (S.D. W. Va.) (action removed Feb. 1997)	Unknown (note: removed from state court)
11.	Chamberlain v. The American Tobacco Co. Inc., No. 1:96CV2005 (N.D. Ohio) (complaint filed Aug. 1996)	Unknown (note: removed from state court)
12.	Masepohl v. American Tobacco Co., Inc., No. CO 96-8786 (D. Minn) (complaint filed Sept. 3, 1996)	Unknown (note: removed from state court; motion to remand pending)
13.	Peterson v. The American Tobacco Co., No. 97-233 (D. Haw.) (complaint filed Feb. 3, 1997)	Unknown (note: removed from state court, No. 97-0490-02 (Hawaii Cir. Ct.)

CASTANO-TYPE CLASS ACTIONS IN STATE COURT

NUMBER	NAME	CERTIFICATION STATUS
1.	Daley v. American Brands, Inc., No. 97L07963, (Ill. Cir., Cook Co. July 7, 1997)	Pending
2.	Knowles v. American Tobacco Co., No. 97-11517 (La. Civ Dist., Orleans Parish June 30, 1996)	Pending
3.	Engle v. R.J. Reynolds Tobacco Co., 672 So.2d 39 (Fla. App. 1996) rev. denied No.88-235 (Fla. 1997)	Granted (Original action involved both Florida and non-Florida plaintiffs. Court limited class to Florida residents only.)
4.	Scott v. American Tobacco Co., No. 96-8461 (La. Dist., Orleans Parish Apr. 16, 1997)	Granted
5.	Lyons v. Brown & Williamson, No. E59346 (Ga. Supr., Fulton Co.) (complaint filed May 27, 1997)	Pending
6.	Geiger v. American Tobacco Co., No. 010687/97 (N.Y. Sup., Queens Co.) (complaint filed May 1, 1997)	Pending
7.	Stewart-Lomanitz v. Brown & Williamson Tobacco Corp., No. 96/110953 (N.Y. Sup.) (complaint filed June 19, 1996)	Pending
8.	Frosina v. Philip Morris Inc., No. 110950/96 (N.Y. Sup.) (complaint filed June 19, 1996)	Unknown

9.	Hoskins v. R.J. Reynolds Tobacco Co., No. 110951/96 (N.Y. Sup.)(complaint filed June 19, 1996)	Unknown
10.	Norton v. RJR Nabisco Holdings Corp., No. 48D01-9605 (Ind. Super., Madison Co.)	Unknown (note: removed to federal court (No. IP-96-0798, S.D. Ind.), and subsequently remanded to state ct.)
11.	Finelli v. Philip Morris Inc., No. 91348-96 (D.C. Super.)	Unknown
12.	Lyons v. The American Tobacco Co., (Ala. Cir., Mobil Co.) (complaint filed Aug. 9, 1996)	Unknown
13.	Walls v. American Tobacco Co., No. CJ-97-5 (Okla. Dist., Creek Co.) (complaint filed Feb. 3, 1997)	Unknown
14.	Zito v. The American Tobacco Co., No. 110952/06 (N.Y Sup.) (complaint filed June 19, 1996)	Unknown
15.	Mroczkowski v. Lorillard Tobacco Co. Inc., No. 110949/96 (N.Y. Sup.) (Complaint filed June 19, 1996)	Unknown
16.	Walters v. Brown & Williamson Tobacco Co., (Fla. Cir., 4th Jud.. Cir.) (complaint filed Aug. 30, 1996)	Unknown
17.	Connor v. TheAmerican Tobacco Co. Inc., No. CV-96C5497 (N.M. Dist., 2nd Jud. Dist., Bernalillo Co.) (complaint filed May 30, 1996)	Unknown

18.	Brammer v. R.J. Reynolds Tobacco Co., No. 73061 (Iowa Dist., Polk Co.) (complaint filed June 20, 1997)	Pending
19.	Ingle v. Philip Morris Inc., No. 97-C-21-5 (W. Va. Cir., McDowell Co.) (complaint filed Mar. 1997)	Pending

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HEADLINE: Why My Jury Let R.J. Reynolds Off

BYLINE: Laura T. Barrow

BODY:

On May 5, a civil jury in Jacksonville, Fla., found R.J. Reynolds Tobacco Co. was not liable for the death of smoker Jean Connor, 49. Outlook asked the forewoman, Laura T. Barrow, to describe how the six-member jury reached its verdict and how she felt about being thrust into one of the most important public health battles of the decade.

As the jury forewoman, it was my job to hand the verdict to the bailiff. I was so nervous that I was shaking. The bailiff took our decision to the judge; I thought I saw a flicker of surprise on his face, but then it was gone. The clerk of the court read the verdict aloud to a packed courtroom.

This was the final scene in the courtroom where the family of Jean Connor was suing R.J. Reynolds Tobacco Co. for wrongful death. Connor had smoked two Reynolds brands, Winston and Salem, for 20 years before her death from lung cancer in 1995. Tobacco has been one of the most talked-about topics in the national media, but we six jurors were asked to do more than just talk about it. We had to make a decision about who was mostly to blame for Jean Connor's death: the company that manufactured and marketed the cigarettes, or the woman who smoked them.

Each of us knew that once our verdict in the company's favor was announced, the decision -- and how we reached it -- would come under intense scrutiny. Still, we didn't want to talk about it right away. We were satisfied that we had come to the right decision based on the legal instructions, but we were emotionally drained. All six of us had agreed that upon being dismissed, we wanted to leave together and not stop to talk to the press. What we said after that was up to us.

When I received the summons to appear for jury duty on April 7, 1997, I was excited. I had been called once before, but wasn't even picked for a jury pool. This time, I hoped to see something interesting. Be careful what you wish for.

Jury selection began with 50 of us filling out questionnaires about our smoking history, careers, family, views on regulatory issues and whether we had read certain books (including, of course, John Grisham's bestselling novel about a tobacco trial, "The Runaway Jury"). That eliminated half of us. Then we were questioned more closely. Ron Motley, an attorney for Connor's estate, was very theatrical and looked us right in the eye. He asked each of us if we had such strong views about smoking litigation that we could not keep an open mind; those who admitted they couldn't were dismissed.

The Washington Post, May 25, 1997

I had revealed on my survey that I was an ex-smoker. Motley asked if it had been difficult to quit. When I said, "No," he quoted Mark Twain: "Quitting smoking is easy. I've done it hundreds of times myself." (We heard that quote quite a few times during the trial.)

My smoking history did not keep me off the jury, which included six members and two alternates. Although we were supposed to represent a "cross section" of the community, the eight of us shared striking similarities. All of us were married. None were full-time smokers. Four of us worked for large corporations, two for medium-sized companies, one for a large retailer and one was a teacher. The oldest was a woman in her forties. At 26, I was the youngest. None of us could believe we had been picked.

The judge, Bernard Nachman, was a delightful man who wore a bow tie. He instructed us not to discuss the case with anyone, including each other, and not to read or watch anything that might relate to the case. (Sometimes he would jokingly read a list of TV shows we could watch.) We were so scared of being sequestered that we followed his orders religiously. We all had visions of what happened to the jury in a famous recent case in Los Angeles.

Opening statements left no doubt about the battle lines. Woody Wilner, a sarcastic man who was one of Connor's attorneys, set the stage for the plaintiff's case by describing Connor, how she began smoking in 1961 at the age of 14, the details of her suffering and why Reynolds should be held responsible for her death. Paul Crist, an attorney for Reynolds, argued that smoking is a personal choice and that Connor knew the risks.

Connor's attorneys went through a slew of witnesses: doctors who testified about the nature and causes of her disease, a marketing professor who brought some recently uncovered internal documents, a scientist fired from Reynolds 30 years ago, Connor's daughter -- and, via videotape, Connor herself.

The plaintiff's biggest gun was Allan Feingold, a pulmonary physician from Miami. He brought a dozen or so books with him, each at least six inches thick. They kept falling on the floor. Feingold, with a touch of arrogance, said if another doctor claimed Connor's illness was anything other than lung cancer caused by smoking, he would be "a liar." By the time he finished, not only was I convinced about Connor's cancer, I also swore that if I ever needed a pulmonary doctor, he would top my list.

Other experts showed us slides of Connor's cells and brought us models of two lungs, one with emphysema and one without. It turned out that they were freeze-dried human lungs. We didn't feel the need to inspect them individually.

Richard Pollay, a marketing professor from Canada, brought documents from a public relations firm Reynolds used in the 1950s, Hill & Knowlton. They became known as "the Hill Papers." The documents, along with others offered by the plaintiff, seemed quite damning on the surface. They proved that yes, Reynolds was quite aware of the health risks associated with smoking. Their scientists had done follow-up research and communicated the findings to company executives. And no, Reynolds did not publicly acknowledge the risks. The company even tried to create doubt about the claims.

But the evidence also showed that smokers were aware of the dangers. We saw article after article describing the risks, beginning in the late 1950s, from

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Reader's Digest, Life magazine, Time magazine and the local Jacksonville papers. So the public knew. And Connor knew. She even testified to it on the videotape. She said "the enjoyment outweighed the risks."

The Reynolds defense case consisted of testimony from a pathologist from California, a historian, a psychiatrist and David Townsend, a top Reynolds chemist. Perhaps the least effective Reynolds witness was an "expert" physician, who brought no books with him and said he had never read any of the Surgeon General's reports about smoking. He said "just because someone smokes and gets cancer doesn't mean that smoking caused the cancer."

Townsend, an extremely charismatic man, made the biggest impact on us. He described the company's research on minimizing carcinogens in cigarettes and its efforts to develop safer products. He showed us a pack of Premier cigarettes, which were test marketed in the late 1980s as safer than other cigarettes because they heated tobacco rather than burned it. Premier failed because "consumers wouldn't accept them." He seemed honest and forthright, and his testimony helped tipped the scales in favor of the tobacco company.

At this point we lost our second juror due to a family emergency, leaving us with the minimum of six. The judge ordered us to eat healthy and look both ways before crossing the street.

Then it was our turn. Deliberations began with each of us verbalizing our thoughts without interruption. We all agreed that Connor knew the risks of smoking; we also agreed that the Reynolds executives knew more than they were telling. A couple of people said they wouldn't mind awarding the family a minimal amount of money, "just so we wouldn't appear to completely side with Reynolds." One juror said, "I wish we could fine Reynolds a lot of money and give it to a charity like the American Cancer Society." Another, however, was adamant that the plaintiff deserved nothing.

We dissected the verdict form and our jury instructions. We were asked to decide two very specific and related questions:

Was Reynolds negligent and, if so, was that a cause of Connor's death?

Did Reynolds make a defective and unreasonably dangerous product?

We all agreed that Reynolds had disregarded a moral responsibility to its customers. The company knew cigarettes can cause lung cancer; it chose not to disclose this and even raised doubts about it. But Reynolds's actions did not negate the fact that the risks were widely known. Did this release Reynolds from all liability? Not in our minds. But that question was not on our verdict form.

Was Reynolds making a defective or unreasonably dangerous product? According to the judge's instructions, a product is not unreasonably dangerous if it performs as safely as a consumer could expect. As one juror put it, "Even if there were no warnings at all, how can you take smoke into your body and not know it's bad for you?"

According to the judge's instructions, a manufacturer has a duty to warn consumers if the risks of a product are better known to the company than to the consumer. But, we were told, a manufacturer does not have a duty to warn if the hazards are "common knowledge."

We also discussed the issue of addiction. Could this be linked to the defective product claim? Two doctors told us that cigarettes are addictive. The Surgeon General has proclaimed they are addictive. I believe they're addictive. But exactly how addicting are they? We were instructed not to set aside our common sense. Those of us who had smoked analyzed our own situations. I quit smoking the first time I tried. So did the other ex-smoker. The social smokers said they didn't find it too difficult not to smoke every day. And, most importantly, Connor was able to quit smoking on her first try.

Motley and Wilner had claimed that Reynolds "targets" a certain amount of tar and nicotine needed to sustain addiction -- what they called the "Secret of Salem." Townsend, the Reynolds scientist, said the company didn't. Whom to believe?

Another issue: Would it have made a difference if the company had put tar and nicotine levels on its packages 20 years ago? Does anyone really pay attention to the ingredients on a can of Coke? We decided that better labeling would not have changed Connor's decision to smoke.

As we realized where the jury instructions and our reasoning was leading us, some jurors were rather disturbed. One cried, saying that Connor "knew the risks" but "they [Reynolds] were wrong." It had been difficult to separate our personal feelings from the job we had to do. After all, it is absolutely tragic to lose a mother or sister. But we weren't asked to make an emotional judgment; we were asked to make a legal decision, based on the evidence and the law.

As I look back on it now, I realize what a valuable experience this was. It's amazing to me that you can throw six strangers together and have them work as cohesively and cooperatively as we did. Motley had implored us to "do the right thing." I believe that's exactly what we did.

GRAPHIC: Illustration, gayle hegland for The Washington Post

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Immunity of the Tobacco Industry To Class Action Suits and Punitive Damage Awards

Class Actions

For Immunity:

1. Class Actions are not necessary. Many plaintiffs in state-wide class action suits demanded compensation in the form of cessation aid, medical monitoring, document disclosure, and injunctions. The settlement provides these things, and the money to finance them does not fall under the annual cap.

2. We should not risk bankrupting the companies. Bankruptcy would lead to a black market and the rise of new tobacco companies that would be not be legally hampered by a devious past.

3. The public gains more from this immunity than the companies do in the form of the industry's concessions in other areas of the settlement. There is nothing in the settlement that guarantees that class actions will succeed, and no plaintiff has ever won money damages from a tobacco company. Juries can be unpredictable. Surveys show that 50% of American do not want to reward smokers whom they believe should show more personal responsibility for their health.

Against Immunity:

1. Immunity against class actions may not be a constitutionally feasible goal. The federal government has almost never imposed procedural rules on state courts.

2. Immunity legitimizes the industry in a sense. They deserve to be punished through high money damages for the fraud and deceit they have perpetrated for profits at the expense of the public health.

3. Class action suits pose the only real fiscal threat to the industry. Plaintiffs lawyers have little incentive to bring individual lawsuits which lack the financial strength to thoroughly attack the industry in court.

Does Immunity Matter-- Can a Class Action Suit be Won?

1. The absolute right to sue is an illusory one, because it is difficult to win.

--Juries are unpredictable.

--Smoking gun documents may not be admitted into evidence.

--Choice of law conflicts can make (and have made) state-wide class action suits unmanageable and, therefore, unattractive to judges.

--It is impossible to predict how states would apply their version of FRCP 23.

--It is difficult for a class to make "intentional addiction of customers" the cause of action, because addiction varies in intensity and duration in each individual smoker. It is possible to overcome an addiction to nicotine, and juries consider each individual's attempts to quit. Despite these flaws, "intentional addiction" is one of the only causes of action to which the industry can not assert "assumption of the risk" as a defense.

Punitive Damages

Options 1-- Refuse the Settlement's Stance

1. The industry has immunity from punitive damages for past wrongdoing.

--We need to come up with a method for differentiating between past and future conduct. The line will be hazy, especially where conduct is of a continuing nature.

--We need to determine how to handle individual claims pending in district court or on appeal in which punitives have been demanded or awarded. Courts may deem that plaintiffs have a property interest in punitive damage claims, especially where the damages have already been awarded and are being appealed.

Option 2--Accept the Settlement's Grant of Immunity with Qualifications

1. Ensure that punitive damages for future conduct are not subject to the annual cap. OR

2. If punitives, whether for past or future conduct, are subject to the cap:

--prioritize compensatory damages under the deferral system, at least when punitives are based on future conduct